No. 80-96

FILED
AUG 28 1980
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1979

SAVOY FAUCET COMPANY, INC., d/b/a SAVOY BRASS MANUFACTURING COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

WILLIAM A. LUBBERS
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Acting Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel
National Labor Relations Board
Washington, D.C. 20570

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 80-96

SAVOY FAUCET COMPANY, INC., d/b/a SAVOY BRASS MANUFACTURING COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BAORD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that petitioner violated Section 8(a)(3) and (1) of the National Labor Relations Act by discriminatorily denying or delaying employment to four applicants because of their union activity.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statute involved 1

Statement 1

Argument 3

Conclusion 6

TABLE OF AUTHORITIES

Cases:

Howard Johnson Co. v. *Hotel Employees*, 417 U.S. 249 4

Macomb Block and Supply, Inc., 223 N.L.R.B. 1285, enforcement denied, 570 F. 2d 1304 5

Statute:

National Labor Relations Act, 29 U.S.C. 151 *et seq.* :

Section 8(a)(1), 29 U.S.C. 158(a)(1) 1

Section 8(a)(3), 29 U.S.C. 158(a)(3) 1

OPINIONS BELOW

The order of the court of appeals (Pet. App. 8-9) is unreported. The decision and order of the Board (Pet. App. 10-36) is reported at 241 N.L.R.B. No. 7.

JURISDICTION

The judgment of the court of appeals was entered on April 21, 1980. The petition for a writ of certiorari was filed on July 21, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

1. Section 8(a) of the National Labor Relations Act, 29 U.S.C. 158(a), provides in part:

> It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 157 * * *
>
> (3) by discrimination in regard to hire * * * to discourage membership in any labor organization * * *

STATEMENT

1. In July 1977, Phelps-Dodge Corporation closed its plant in Long Island City, New York, which manufactured plumbing fixtures under the name of Savoy Brass (Pet. App. 16). When it was closed, the plant had about 80 employees represented by Local 28-A (*id.* at 15 n.2, 16).[1] In October 1977, the inventory and some of the equip-

---

[1]Metal Production and Novelty Workers Union, Local 28-A, International Brotherhood of Painters and Allied Trades, AFL-CIO.

ment from that operation were purchased by Savoy Faucet, Inc. ("the Company"), which shortly thereafter began manufacturing plumbing fixtures (Pet. App. 17).

The Company hired some of the former Phelps-Dodge employees, but it refused to hire many others. On October 31 a number of the former Phelps-Dodge employees who had not been hired by the Company began to picket the plant on behalf of Local 28-A, which sought recognition as the representative of the Company's employees (Pet. App. 17-18). In a Board election held on December 2, the employees rejected Local 28-A's bid for recognition. On the day of the election, 23 former Phelps-Dodge employees who had not been hired by the Company and who had unsuccessfully sought to vote in the election went to the Company's office with Saul Lasher, Local 28-A's business representative. Lasher had obtained the signatures of each of these employees on separate forms which read: "I worked for Savoy Brass for—years as a—. I would like to work for Savoy [Faucet] immediately and I am available for work." These forms were presented to the company officials who were present. Clinton Goerler, one of the owners of the Company, told the employees that the Company had no openings at the time but would call them when jobs became available (Pet. App. 18; A. 194-195).[2]

Later, the Company did hire some of the applicants (Pet. App. 22). The Board found, however, that the Company had refused to hire one of the pickets and had delayed hiring three others because of their activities on the picket line. The Board examined the basis tendered by the Company for initially rejecting each of the 11 picketing employees for hire in December 1977, when

---

[2]"A." references are to the printed appendix filed in the court of appeals.

other applicants were hired. The Board found that (1) the reason asserted for refusing to hire Blanca Amaya—i.e., excessive absences while employed by Phelps-Dodge—was false (Pet. App. 27-28), (2) the reasons offered for delaying offers to Carmen Garcia and John Luscavage were incredible[3] (Pet. App. 29-30), and, (3) no reason was tendered for delaying the offer to Olga Vega (Pet. App. 30). The Board ordered the Company, *inter alia,* to offer employment to Amaya, and to make whole Amaya, Garcia, Luscavage and Vega for any wages lost as a result of the discrimination against them (Pet. App. 12).

2. The court of appeals enforced the Board's order without comment (Pet. App. 8-9).

ARGUMENT

Petitioner does not contest the Board's finding, upheld by the court of appeals, that its refusal to hire Amaya and its delay in hiring Garcia, Luscavage and Vega were motivated by the picketing activities of those employees. Rather, petitioner's sole argument is that it was entitled to reject the employees' applications for employment because they were tendered by Local 28-A, a minority union. There is no merit in that contention.

---

[3]A company official testified that Garcia was the "hardest working woman we have ever had" and did a "bangup job in quality control" (A. 129). He testified that he had failed to offer her a job earlier despite his difficulties in operating with inexperienced and, in some cases, admittedly unsuitable employees, because he was afraid she would refuse the lower paying production job that she accepted when offered (Pet. App. 29-30; A. 129). Luscavage had worked at the plant since 1942, and, as the Company was aware, had done a variety of skilled and unskilled jobs (A. 131-132, 190-191). The Company asserted that it had waited to hire Luscavage until the specific job he had done at the time of the shutdown—assembling raw castings—was available (A. 131-132, 158-160).

Petitioner did not refuse to consider the job applications that the discriminatees and other employees signed individually but submitted through Local 28-A's business representative. Rather, petitioner's managing owner, Clinton Goerler, accepted the applications, advised that petitioner would hire the applicants when jobs became available, and ultimately hired three of them. Moreover, petitioner never gave as a reason for not hiring any of the employees that their applications had been improperly submitted through Local 28-A. Contrary to petitioner (Pet. 6), nothing in the Board's decision suggests that an employer is required to deal with a minority union for any purpose or that petitioner was required to deal with Local 28-A.[4] Petitioner voluntarily accepted the individual applications tendered by the union agent and the Board's order does not require the Company to deal with Local 28-A in any manner.

Howard Johnson Co. v. *Hotel Employees*, 417 U.S. 249 (1974), (Pet. 5-6), provides no support to petitioner. There the Court held that, under the circumstances presented, a new employer could not be forced to arbitrate the extent of its obligations to its predecessor's former employees. This Court explicitly noted that, notwithstanding its holding, a new employer could not refuse to hire individuals based on "union membership or activity under § 8(a)(3) of the [NLRA]." 417 U.S. at 262 n.8. Nothing in the Board's decision or the court's order here suggests that

---

[4] The General Counsel did not contend and the Board did not find that Savoy Faucet was a "successor" to Phelps-Dodge (Pet. App. 17). The Board specifically stated that the Company's only "duty in * * * regard [to hiring former Phelps-Dodge employees] is a negative one—to refrain from refusing to hire any former Phelps-Dodge employees, all of whom were unionized, because of their former union affiliations or their current union activities" (Pet. App. 22).

an employer is required to deal with a minority union for *any* purpose.

Macomb Block and Supply, Inc., 223 N.L.R.B. 1285 (1976), enforcement denied, 570 F. 2d 1304 (6th Cir. 1978) (Pet. 6) is distinguishable on its facts. The only application by the employees of the prior employer for employment with Macomb Block was made through the Teamsters, which sought through picketing to compel Macomb Block to hire the employees of the former owner at the rate paid under their old contract. Although the Board found that prior to the picketing Macomb Block had announced its intention not to hire any of the former owner's employees simply because they had been represented by the Teamsters (223 N.L.R.B. at 1286), the Sixth Circuit apparently accepted Macomb's argument that the employees conditioned their offer to work on Macomb's acceptance of the terms of the contract negotiated, but not signed, by the union and Macomb's predecessor, which would constitute tacit recognition of the Teamsters. In the instant case, however, the union's recognition claim had been rejected through Board processes, the picketing had ceased, and each of the former employees submitted an unconditional application for employment. Although the individual applications were submitted by a union official, there was no demand for either recognition of the union or adherence to the terms of any prior contract, and the company voluntarily accepted the applications without protest.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

WILLIAM A. LUBBERS
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Acting Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel
National Labor Relations Board

AUGUST 1980

DOJ-1980-08